No. 80532-6

SUPREME COURT OF THE STATE OF WASHINGTON

RENTAL HOUSING ASSOCIATION OF PUGET SOUND,

Appellant,

v.

CITY OF DES MOINES,

Respondent.

APPELLANT'S RESPONSE TO AMICUS CURIAE BRIEFS OF ATTORNEY GENERAL OF WASHINGTON, WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS AND WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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I. INTRODUCTION

State, county and city government lawyers would avoid transparency and scrutiny by simply ignoring RCW 42.56.210(3), the part of the Public Records Act (PRA) that requires them to tell citizens which records are secret and why. The Washington State Association of Municipal Attorneys (WSAMA) and the Washington Association of Prosecuting Attorneys (WAPA) *fail to even mention* RCW 42.56.210(3).

The government lawyers also revive the false notion that this case is about whether citizens can unilaterally control the PRA statute of limitations. Nobody has advocated such a theory. The Rental Housing Association of Puget Sound (RHA) has, in fact, extensively rebutted it. The government lawyers refuse to see what RHA has argued all along - that the PRA provides an objective test for determining when the one-year limitation period begins. It begins either when an agency identifies each record it is withholding and why each record is exempt, or when the last requested records are produced, whichever is later.

Meanwhile, the Attorney General relies on the false premise that, because he originally proposed the 2005 statute of limitations at issue, this Court's interpretation of the statute should be guided by his assertions

about his own intent. This is confused. The only intent that matters, under rules of statutory interpretation, is that of the legislative branch.

More importantly, although the Attorney General repeatedly quotes his own testimony to the Legislature as purported evidence of the intent behind RCW 42.56.550(6), he neglects to mention the testimony most relevant to this case. That is, legislators were told that the 2005 law **would not change the pre-existing requirement to explain specifically why** each concealed record is allegedly exempt from disclosure. Thus, when the Legislature decided that a PRA action must be filed "within one year of an agency's claim of exemption," it did so with the understanding that such a claim must be specific, as RCW 42.56.210(3) requires.

RHA brought its action within one year of the City's claim of exemption or, alternatively, within one year of the City's last production of requested records. Therefore, under RCW 42.56.550(6), the action was timely, and the trial court's order of dismissal should be reversed.

II. DISCUSSION

The statute of limitations at issue says:

> Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

RCW 42.56.550(6).

A. RCW 42.56.210(3) Cannot Be Ignored.

1. **Legislative history supports harmonizing RCW 42.56.550(6) with RCW 42.56.210(3).**

The Attorney General repeatedly cites his own testimony to the Legislature as purported evidence of the legislative intent behind House Bill 1758, which included the new PRA statute of limitations as well as other amendments to the PRA. Brf. of Am. Cur. A.G., pp. 4-5, 12-13. For example, in asserting that the statute of limitations was changed from five years to one year in order to limit agencies' exposure to penalties, which may be imposed for each day of a PRA violation pursuant to RCW 42.56.550(4), the Attorney General does not cite to anything that any legislator said. Id., pp. 4-5. Rather, the only authority cited by the Attorney General is a TVW tape of his own testimony at a hearing. Id.[1]

In fact, it is the Legislature's intent, not the requesting executive's intent, which matters. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (a court must give effect to legislative intent). Here, the prime sponsor of the legislation, Rep. Lynn Kessler, stated exactly what the intent of HB 1758 was:

> I think it's important for the committee to keep in mind what the intent of all of this is, and that is the public disclosure, and sort of putting sunshine on all the things

[1] Similarly, in asserting that the 2005 legislation was "intended to provide a balanced approach" to reform, the Attorney General cites only his own testimony. Id., p. 4.

> that our government does...that we want to make sure that our government does not close access to our citizens, so that they have the ability to see what our agencies do.[2]

That statement of overarching intent means that RCW 42.56.550(6), originally enacted as part of HB 1758, must be interpreted with promoting disclosure in mind. It cannot be read to cut off judicial review as soon as possible simply to shield agencies from penalties, as government lawyers advocate, because that would preclude disclosure when an agency misunderstands the law. Brf. of Am. Cur. A.G., pp. 5, 11; Brf. of WSAMA, p. 8. The truth is, legislators did not say why they changed the statute of limitations – they spoke only to the purpose of HB 1758 as a whole.

Besides, the Attorney General neglects to mention the most relevant part of the 2005 hearing on HB 1758. Rep. Jim Clements asked if the bill would require agencies to give a reason, in writing, when they withhold records. Bill Hearing at 40:10. Attorney General Rob McKenna responded:

> *We're not changing that part of the existing Public Disclosure Act.* We're staying with the language that the public adopted in the 1970s.

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[2] *See* www.tvw.org, "Media Archives/Audio Video Archives," "House Committees/2005/State Government Committee," and go to "House State Government Operations & Accountability, Feb. 9, 2005," (hereafter "Bill Hearing") at 0:24.

Id. at 40:10 to 40:46 (italics used for emphasis). He was referring to the provision now codified as RCW 42.56.210(3), which said that when an agency withholds records, it must identify each record that is being withheld and cite the specific exemption that allegedly applies to each record. Id.[3] Thus, **the Attorney General himself reassured legislators that agencies must be specific when claiming that records are exempt.** Later in the same hearing, a citizen, David Koenig, brought up Rep. Clements' question again and offered a more detailed explanation of RCW 42.56.210(3). Id. at 1:02:00 to 1:04:00.

Because the Legislature was reassured that under HB 1758, agencies would be required to explain which specific exemption applies to each withheld record – just as in the past -- the term "claim of exemption" must be interpreted in harmony with that requirement. In sum, to the extent that legislative history is considered, it supports an interpretation of RCW 42.56.550(6) that gives effect to RCW 42.56.210(3) and that recognizes that the limitation period does not begin until a specific (legally adequate) claim of exemption is made.

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[3] "Agency responses refusing, in whole or in part, inspection of any public record shall include *a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.*" RCW 42.56.210(3) (italics added).

2. An agency interpretation cannot trump plain words.

Even if the legislative history supported the Attorney General's interpretation of the PRA statute of limitations, it is not necessary to consider it. When a statute is plain and unambiguous:

> a court will not construe the statute, but will glean the legislative intent from the words of the statute itself, *regardless of a contrary interpretation by an administrative agency.*

Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005) (italics added). Because the PRA is plain and unambiguous, the interpretations of government lawyers are irrelevant in gleaning legislative intent.

3. All PRA provisions must be harmonized.

The Attorney General correctly notes that the word "exemption" in RCW 42.56.550(6) "draws meaning from" other sections of the PRA. Brf. of Am. Cur. A.G., p. 8. *See*, e.g., RCW 42.56.210 to .290 (defining exemptions to disclosure requirements). Contradictorily, however, the Attorney General argues that although the word "exemption" should be defined with reference to other parts of the PRA, the word "claim" in the term "claim of exemption" should be defined in isolation, in a manner that conflicts with Section .210(3) of the PRA. Brf. of Am. Cur. A.G., pp. 8-9.

Similarly, WSAMA would harmonize RCW 42.56.550(6) with *one* part of the PRA - the requirement to provide the "fullest assistance" to

records requesters – but not with *all* parts. Brf. of WSAMA at p. 8. WSAMA does not even mention RCW 42.56.210(3).

This selective approach to harmonization is unsupported by law. When interpreting a PRA term, even if it is not ambiguous, it is necessary to read all of the PRA's provisions together and to harmonize them. Ockerman v. King County Dept. of Development and Environmental Services, 102 Wn. App. 212, 216-217, P.3d 1214 (2000). "Statutes are construed *as a whole*, to give effect to *all* language and to harmonize *all* provisions." Id. at 216 (italics added); *Accord,* Department of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

The Attorney General's and WSAMA's approach would allow agencies to choose which parts of the PRA to comply with, and to serve their own interests in non-disclosure at the expense of the people's interest in knowing what their governments are doing. This would defeat the strongly worded mandate to liberally construe the PRA to "assure that the public interest will be fully protected." RCW 42.56.030. In sum, the term "claim of exemption" in RCW 42.56.550(6) must be harmonized with *all* provisions of the PRA, especially the most relevant one, RCW 42.56.210(3). Because the City of Des Moines did not even attempt to identify each record it was withholding from RHA until April 2006, there

was no claim of exemption triggering the one-year statute of limitations until at least April 2006, and the January 2007 action was timely.

4. **The public's interest is paramount.**

The government lawyers argue that the right to judicial review should be cut off within one year of *any* denial of records, no matter how vague, even in a case such as this one where the City of Des Moines repeatedly refused to identify the specific records it was withholding from RHA in violation of RCW 42.56.210(3). Brf. of Am. Cur. A.G., pp. 8, 10; Brf. of WSAMA, pp. 5, 10 (referring to "denial" as the trigger and failing to address what constitutes a "claim of exemption"); Am. Cur. Brf. of WAPA, p. 9 (the "form of the claim" does not matter). This approach would defeat the purpose of the PRA, because citizens cannot be expected to initiate costly litigation to obtain records if they do not even know what records they are fighting over.

The policy reason offered for the lawyers' secrecy-shielding approach is that governments should "have certainty about the scope of their potential liability." Brf. of Am. Cur. A.G., p. 10. While such a policy might make sense in tort or other contexts, it cannot justify relieving agencies of their obligation to explain what they are hiding from the public, and why. RCW 42.56.030; RCW 42.56.210(3). The public's

interest in disclosure *must come first.* RCW 42.56.030.[4] The right to judicial review is an important part of protecting that public interest. RCW 42.56.550; Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005). In light of the mandate to liberally construe the PRA to promote disclosure, the policy of certainty cannot be elevated above the overarching policy of holding governments accountable. RCW 42.56.030.

Here, the City of Des Moines refused to provide *any* identifying details about withheld records for eight months, and even then provided only some of the required details, contrary to WSAMA's assertions that RHA had "plenty of information" and that the City "acted responsibly" at all times. Brf. of WSAMA, p. 7. The Attorney General, WSAMA and WAPA would encourage agencies to engage in the same kinds of "hide the ball" tactics by shielding them from judicial review – and potential penalties - when they ignore RCW 42.56.210(3).

Consider the following hypothetical. Joe Citizen is concerned that his mayor is soft on crime, and asks for all correspondence between Mr.

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[4] "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." RCW 42.56.030.

Mayor and the police chief. Shortly before Mr. Mayor's reelection, Joe Citizen is given 100 pages of e-mails and letters, along with a statement that one document is being withheld because it is exempt from disclosure. The statement does not give any clue about the nature of the withheld record, nor does it explain which specific exemption applies. Although this vague response violates RCW 42.56.210(3), Joe Citizen does not bother with a public records lawsuit because he is not wealthy, and he doubts that the one document would be interesting enough to justify hiring an attorney and paying a $200 filing fee. More than a year later, however, Mr. Mayor is arrested for selling heroin. Joe Citizen is stunned to learn that the record withheld from him actually was the police chief warning Mr. Mayor that he faced a criminal investigation. If Mr. Mayor had identified the nature of the record, or alleged that it fell under the specific exemption that applies to law enforcement investigations, Joe Citizen would have been alerted that Mr. Mayor was hiding something important and he could have made an informed judgment about whether to sue.

Under the government lawyers' interpretation of the PRA statute of limitations, Joe Citizen would have no way to hold Mr. Mayor accountable for hiding the truth from voters. The Attorney General, WSAMA and WAPA would allow Mr. Mayor to use the one-year statute of limitations

as a defense to a public records suit, even though Joe Citizen had no reason to file suit until the nature of the withheld record was revealed.

Such a result is absurd because it utterly defeats the PRA purpose to hold agencies accountable. RCW 42.56.030. When interpreting a statute, a court should avoid absurd results. Thompson v. Hanson, 142 Wn.App. 53, 60, 174 P.3d 120 (2007). It is absurd to force citizens to sue before they can find out if withheld records are of any interest.

B. "Last Production of Records on a Partial or Installment Basis" Has a Plain and Unambiguous Meaning.

1. **What matters is what is "last."**

There can be no genuine dispute that "last" means final, and that "production on a partial or installment basis" means releasing a requested set of records in more than one part. *See* Brf. of Am. Cur. A.G., p. 13 (an 'installment' is 'one of several parts'); RCW 42.56.080.[5] That is why WAPA correctly argues as follows:

> The PRA is clear that when records are produced on an installment basis, the statute starts running on the date the last installment was produced...[I]t makes no difference whether the agency has called the final installment 'the last installment.' Indeed, it does not matter if the agency has said that there may be further

[5] RCW 42.56.080 says: "[A]gencies shall, upon request for identifiable public records, make them promptly available to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure."

> installments forthcoming. What matters is that at a certain point in time records ceased to be produced.

Am. Cur. Brf of WAPA, pp. 5-6. Thus, even county attorneys – who have an interest in making the statute of limitations as short as possible – recognize that its plain meaning cannot be ignored. [6]

This is in contrast to the Attorney General, who would ignore the plain meaning of RCW 42.56.550(6) and alter it as follows:

> Actions...must be filed within one year of...the last production of records **which the agency said in advance would be released** on a partial or installment basis.

Brf. of Am. Cur. A.G., p. 14 (extra words in bold). By adding words to the statute, the Attorney General would thwart the legislative intent to start the one-year limitation period only after the records requester has *all* available records, so that the requester and the court are fully informed when proceeding with judicial review, and so that needless or premature litigation is discouraged. The Attorney General's alteration of the plain language must be rejected because legislative intent is gleaned "from the words of the statute itself, regardless of a contrary interpretation by an administrative agency." Burton, 153 Wn.2d at 422.

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[6] WSAMA, the group of city attorneys, does not address this issue.

Once again, a hypothetical application of the Attorney General's reasoning illustrates its absurdity. This time, Joe Citizen is given 100 pages of communications between Mr. Mayor and the police chief, but he is not told that another record exists. As far as Joe Citizen knows, he has all that he requested, because Mr. Mayor has not said that more records will be released on a partial or installment basis, and has not acknowledged withholding anything. Thus, Joe Citizen has absolutely no reason to sue. Then more than a year later, after the drug bust, Mr. Mayor belatedly produces the police chief's letter warning of an investigation. This is the "last production" of records responsive to Joe Citizen's request. But under the Attorney General's interpretation, Joe Citizen is time-barred from suing over the unlawful withholding because, at the time of the original production, Mr. Mayor did not say that production would be on a partial or installment basis. There is no penalty for concealing the truth.

This result is obviously ridiculous. A statute of limitations is not a tool for deceit. It is a clear line, drawn by statutory terms. The Attorney General's approach would allow agencies to start the limitation period on their own terms, so as to shield the "last production" from scrutiny. This is contrary to common sense and the plain terms of RCW 42.56.210(3).

2. Public records policy is decided by the Legislature, not administrative agencies.

In this case, the City of Des Moines admits that its last production of records requested by RHA was in February 2007, after RHA filed suit. Brief of Resp. at p. 34. The Attorney General says that in such a "rare occasion," when an agency belatedly produces records in an effort to settle a suit, there are policy reasons why a new limitation period should not commence. Brf. of Am. Cur. A.G., pp. 14-15. If so, the Attorney General can take his concerns to the Legislature. For now, however, the Legislature's stated policy is to start a new limitation period upon the "last" production, without reference to the reason for that production. RCW 42.56.550(6). That is the only policy that matters. Burton at 422.

On its face, RCW 42.56.550(6) is not concerned with whether an agency wants to settle a suit or uses the term "installment," or any aspect of an agency's perspective. It is strictly concerned with sequence. Simply put, if an agency produces a requested set of records in more than one part, it is the "last production" that causes the one-year limitation period to commence. RCW 42.56.550(6); RCW 42.56.080. Contrary to the Attorney General's arguments, the statute does not allow each agency to decide for itself what constitutes a "last production."

Unlike the Attorney General, WAPA acknowledges that an agency restarts the limitation period each time it responds to the same records

request - even if the last production is more than a year after the first one. Am. Cur. Brf of WAPA, p. 7.

> This serves to preserve the requester's right to litigate all issues relating to the agency response to a given request. If this were not the rule, then the requester would be forced to file multiple claims after every production on an installment basis.

Id. In this case, the City responded to RHA's July 2005 records request on a partial or installment basis, first in August 2005, then in March 2006, and finally in February 2007 after the suit was filed.[7] Because the one-year limitation period does not begin until the "last production" of requested records, the trial court erred in dismissing the suit as untimely.

C. RHA's Position is Misrepresented.

WSAMA and WAPA devote considerable discussion to rebutting arguments that RHA never made. Brf. of WSAMA, pp. 5-6, 8-9; Am. Cur. Brf. of WAPA, pp. 8-10. It bears repeating: ***RHA seeks only to apply the objective test*** embodied in the PRA for determining when the one-year limitation period begins. Reply Brf. of Appellant, pp. 4-6; Brf. of Appellant, p. 22. RHA ***does not argue*** that the PRA's limitation period:

- begins when an agency responds to an inquiry about an exemption log (Brf. of WSAMA, pp. 5-6);

[7] WSAMA incorrectly asserts that the March 2006 production did not include records responsive to RHA's original July 2005 records request. Brf. of WSAMA, p. 2. For a thorough rebuttal of this assertion, please see Appendix A to RHA's Reply Brief.

- restarts every time an agency corresponds with a records requester (Id., pp. 8-9);
- depends on the outcome of litigation concerning the adequacy of an agency's production of records (Am. Cur. Brf. of WAPA, p. 8);
- depends on whether a court ultimately finds that an agency cited the correct exemption (Id., p. 9);
- can be unilaterally controlled by a records requester (Id., p. 10).

RHA did not make any of the arguments above, and in fact expressly disavowed them. Reply Brf. of Appellant, pp. 5-6. RHA did argue that an agency makes a "claim of exemption," commencing the limitation period, when it meets the three-part test embodied in RCW 42.56.210(3): 1) it identifies each withheld record; 2) states a specific exemption; and 3) explains why a specific exemption applies to each record. Id. RHA also said that a "claim of exemption" need not be legally correct for statute of limitations purposes, because RCW 42.56.210(3) is only concerned with specificity – it is designed to provide as much information as possible so that the lawfulness of a withholding can be evaluated. Id., p. 6 (FN 1). Remarkably, however, WSAMA and WAPA *do not discuss RCW 42.56.210(3) at all.* Their efforts to confuse the issues should be rejected.[8]

[8] WAPA does not purport to address RHA's case specifically, and discusses a number of hypothetical applications of RCW 42.56.550(6) that have no bearing on this case. *See*, e.g., Am. Cur. Brf. of WAPA, pp. 1-5. RHA objects to WAPA's arguments to the extent that they mislead this Court about the nature of arguments made, and misapply the PRA.

D. When A Citizen Resubmits a Records Request, the Limitation Period Starts Over.

WAPA argues illogically that when a citizen requests the same records more than once, a subsequent request should not "resurrect a prior records request." Am. Cur. Brf. of WAPA, p. 12. This misses the point that a *request* does not trigger the limitation period. Rather, it is the agency's *response* to a request – i.e., a production of records – that determines when a suit must be filed. RCW 42.56.550(6). Also, WAPA fails to grasp that the only reason to repeat a records request is to get an adequate response where one has been lacking. When the same records are requested repeatedly, only the *last response* can trigger the limitation period, because that is when the citizen has all of the information bearing on the lawfulness of the agency's withholding of the records. RCW 42.56.550(6). If there is a new production of records or claim of exemption following a new request for previously sought records, as in this case, the previous response becomes moot for limitation purposes.

That is what happened here. RHA was compelled to make three requests for the same records – on July 20, 2005, October 7, 2005, and January 25, 2006 – because of the City's prolonged refusal to identify what records it was withholding, to explain why they allegedly were exempt, and to release requested records that were never alleged to be exempt. *See*

Reply Brf. of Appellant, pp. 9-14.[9] Repeated requests were necessary for RHA to find out if litigation could be avoided. Only by writing multiple letters did RHA persuade the City to reconsider its position and finally, in April 2006, to identify the withheld records for the first time. Especially under these circumstances, when citizens are trying to avoid litigation by educating an agency about the law, and when the agency ultimately alters its response, the limitation period must begin with the last claim of exemption or production bearing on the records in question.

E. The Attorney General is Not Entitled to Deference.

It is important to bear in mind that, when testifying at a hearing, the Attorney General is simply lending his voice to a political process.[10] He is not issuing a formal legal opinion. Thus, although this Court normally gives considerable weight to an Attorney General's official opinion, we have an entirely different situation here where the Attorney General's arguments are based on political statements rather than a legal opinion. Bates v. City of Richland, 112 Wn.App. 919, 933, 51 P.3d 816 (2002).

The situation here is like the one in ATU Legislative Council of Wash. State v. State, 145 Wn.2d 544, 40 P.3d 656 (2002). In that case, the

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[9] The trial court erred by dismissing the entire suit although no claim of exemption was *ever* made regarding some withheld records.

[10] Attorney General McKenna is a Republican. Democrats controlled the Legislature in 2005. Partisan differences are, in addition to separation of powers, a reason that an executive's motives in sponsoring a bill cannot be imputed to the Legislature as a whole.

State cited the Attorney General's letter to the Legislature as purported evidence of a legislative intent to repeal a special transit tax by implication. Id. at 554. This Court rejected the State's argument, saying:

> [T]his court gives little deference to attorney general opinions on issues of statutory construction.

Id. (citation omitted). Just as the Attorney General's letter was not determinative in that case, the Attorney General's testimony about HB 1758 does not guide resolution of this case.

Furthermore, no deference is due to an agency's interpretation of a statute unless that agency is charged with the statute's administration and enforcement. Seattle Building and Construction Trades Council v. The Apprenticeship and Training Council, 129 Wn.2d 787, 799, 920 P.2d 581 (1996). The Attorney General does not enforce the PRA, but instead drafts "advisory model rules" for carrying it out. WAC 44-14-00001.

Finally, in determining legislative intent, a court gives weight to an agency's interpretation only if it is a consistently applied, well-known interpretation. Lee v. Jacobs, 81 Wn.2d 937, 940, 506 P.2d 308 (1973); Rumsey v. Department of Labor and Industries, 192 Wn. 538, 543, 74 P.2d 214 (1937) (an interpretation is considered if it has "acquired weight as a precedent"). This case involves issues of first impression. The

Attorney General has never issued a legal opinion on these issues. Therefore, no deference is due.

F. The Statute of Limitations Was Equitably Tolled.

WSAMA grossly distorts the record in arguing that equity favors the City. Brf. of WSAMA, p. 7. The City promised to reconsider its position; repeatedly asked for more time to respond; repeatedly failed to meet its own time estimates for reconsideration and response; waited eight months to say what it was hiding; specifically asked RHA to delay a suit; and ultimately produced everything requested *after* forcing RHA to initiate costly litigation. On this record, equity tolls the statute of limitations.

III. CONCLUSION

For the foregoing reasons, the Court should reverse the dismissal and remand the case for trial and an award of penalties and fees.

Dated this 16th day of April, 2008.

Respectfully submitted,

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